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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-518

EARL VOGT,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Subject Index

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provision and Statute Involved	2
Statement	3
Reasons for Granting the Writ	6
Conclusion	13

Appendices

Appendix A	i
Appendix B	xxvi
Appendix C	xxix

Table of Authorities Cited

Cases	Pages
Brady v. Maryland (1963) 373 U.S. 83	6, 8, 9
Byrd v. Wainwright (5th Cir. 1970) 428 F.2d 1017	7, 11
Clay v. Black (6th Cir. 1973) 479 F.2d 319	9
United States v. Cobb (SDNY 1967) 271 F.Supp. 159	9
United States v. Donaway (9th Cir. 1971) 447 F.2d 940	7
United States v. Echeles (7th Cir. 1965) 352 F.2d 892	7
United States v. Hickok (9th Cir. 1973) 481 F.2d 377	9
United States v. Shuford (4th Cir. 1971) 454 F.2d 772	7
Williams v. Dutton (1968) 400 F.2d 797, 89 CT 908, 393 U.S. 1105	10

Constitutions

United States Constitution, Fifth Amendment	2, 11

Rules

Federal Rules of Criminal Procedure:	
Rule 14	3
Rule 16	3

Statutes

18 U.S.C.:	
Section 371	3
Section 1341	3
Section 1343	3
Section 1962(c)	3
Section 3500	2, 6, 9
28 U.S.C., Section 1254(1)	2

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Earl Vogt, petitioner herein, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals (App.A, infra), is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 26, 1977 (App.B, infra). The Court of Appeals denied petitioner's petition for re-hearing on September 6, 1977 (App.C, infra). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government's failure to provide the petitioner with pre-trial discovery of exculpatory evidence violated the petitioner's right to due process of law.

2. Whether the Trial Court's refusal to grant the petitioner's motion for severance deprived the petitioner of his right to present the exculpatory testimony of his co-defendant to the jury.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property without due process of law * * *

2. 18 U.S.C. 3500 (The Jencks Act) provides in pertinent part:

> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a government witness or prospective govern-

ment witness (other than the defendant) to an agent of the government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

3. Rule 14 of the Federal Rules of Criminal Procedure provides in pertinent part:

> If it appears that a defendant of the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the Court may order an election of separate trials of counts, grant a severance of defendants, or provide whatever other relief justice requires.

STATEMENT

On June 5, 1975 petitioner Earl Vogt and six other named persons were indicted by a Special Federal Grand Jury in San Francisco, California. The petitioner and each of the other co-defendants were charged with multiple violations of 18 U.S.C. 1343 (wire fraud), 18 U.S.C. 1341 (mail fraud), 18 U.S.C. 1962(c) (racketeering) and 18 U.S.C. 371 (conspirracy).

The petitioner Earl Vogt entered a plea of not guilty to each count of the indictment and was set for trial by jury on August 5, 1975. Prior to the date for trial the petitioner and each of the named defendants made a detailed motion for discovery pursuant to Rule 16 of the Federal Rules of Criminal Procedure

(CT 89).[1] The government responded to the petitioner's request for pre-trial disclosure of exculpatory evidence by stating in open Court that such evidence would be disclosed "promptly when and if any such favorable evidence is discovered . . ." (Government's Response, CT 140.)

The trial of the case commenced on August 5, 1977 and continued until September 8, 1977. During the course of the trial counsel for the petitioner inadvertently discovered that one of the co-defendants, Douglas Cassidy, had given a statement to the FBI which was highly exculpatory to the petitioner.[2] (RT Vol. 16, p. 2959.) Although this statement was contained in an FBI 302 report which had been in the possession of the government for some time prior to trial, the government had failed to disclose the statement to defense counsel. The government prosecutor stated that the 302 report was not disclosed to defense counsel because the government doubted the reliability of the information contained in the report. (RT Vol. 16, p. 2960.)

When the petitioner discovered the exculpatory evidence contained in the Cassidy 302 report he immediately sought to ascertain whether or not Cassidy was going to take the witness stand in his own behalf.

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[1]"CT" designates Clerk's Transcript on appeal in the Ninth Circuit. "RT" designates Reporter's Transcript on appeal in the Ninth Circuit.

[2]Douglas Cassidy occupied the anomolous position of government informer and indicted co-defendant. While Cassidy was employed as a government informer, who penetrated the Eurovest conspiracy at the government's behest, he gave information to the FBI that Earl Vogt was a "victim" rather than a conspirator.

Once the petitioner determined that Cassidy was not going to testify in his own defense, the petitioner made a showing of his intent to call Cassidy as a defense witness. (RT Vol. 17, pp. 3243-3244.) Cassidy's refusal to testify as a defense witness, on Fifth Amendment grounds, deprived petitioner of any opportunity to get Cassidy's exculpatory observations to the jury. The petitioner made detailed motions for severance on two separate occasions, but his motions were denied by the trial judge.[3]

Unable to call Cassidy as a witness, the petitioner attempted to introduce the extrajudicial statements of Cassidy into evidence, but was thwarted by the objections of counsel for Cassidy. (RT p. 3018.) Ultimately the petitioner's counsel managed to get a portion of the exculpatory evidence before the jury by cross-examination of the FBI agent who prepared the report.[4]

The petitioner raised the inter-related issues of the denial of adequate pre-trial discovery and the refusal of his motions to sever in his appeal before the Court of Appeals for the Ninth Circuit. But the Court of Appeals affirmed his conviction on the grounds that he obtained the benefit of the Cassidy testimony through cross-examination of the FBI agents. (App. A, p. xvi.) The Court of Appeals further held

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[3]In its opinion the Court of Appeals recognized that the petitioner diligently pursued his motion to sever, and that he was clearly intending to call Cassidy as a witness. (App.A, p. xv.)

[4]The Ninth Circuit panel pragmatically recognized that the agent's testimony on cross-examination was "not an adequate substitute for Cassidy's (testimony) . . ." (App.A, p. xvi.)

that the Trial Court properly denied petitioner's motions to sever since the petitioner failed to establish a willingness on the part of Cassidy to testify if a severance were granted. (App.A, p. xvi.)

The Court of Appeals denied petitioner's petition for a rehearing and issued a modified opinion affirming its earlier decision on September 6, 1977. (App.C.)

REASONS FOR GRANTING THE WRIT

This case presents two important and related questions concerning the rights of individual defendants who are joined with other defendants in multiple defendant criminal trials. Initially, this Court should decide whether or not the limitations imposed on pretrial discovery of witness defendants in Federal criminal trials by the so-called Jencks Act (18 U.S.C. §3500) should yield to the constitutional requirement that a criminal defendant be granted meaningful access to any evidence which could tend to establish his innocence. *Brady v. Maryland* (1963) 373 U.S. 83. This is a question which remains unresolved despite a variety of conflicting Circuit Court opinions dealing with possible resolution of the invariable conflict between the Jencks Act and the *Brady* rule.

Secondarily, this case graphically illustrates the potential danger inherent in multiple defendant trials. An individual defendant in such a trial may well be precluded, by Fifth Amendment considerations, from obtaining vital testimony to establish his

innocence from a co-defendant who is a percipient witness and who is unwilling or unable to testify in a consolidated trial. There have been a number of Circuit Court decisions dealing with the right of a defendant to obtain a severance in order to obtain access to the favorable testimony of a co-defendant, but the rule of law relating to the standards to be employed by the Trial Court in determining whether or not to grant the severance is by no means clearly settled.[5]

The decision by the Court of Appeals has left these two complicated issues of law unresolved and only a definitive opinion from this Court can clearly and certainly establish a workable standard for pre-trial discovery of exculpatory evidence and for adequate guidelines to be utilized by Trial Courts in determining the validity of motions to sever criminal trials in order to obtain exculpatory evidence.

The resolution of both these complicated questions is of fundamental importance to the rights of individual defendants and to the overall effectiveness of the criminal justice system.

1. In affirming the conviction of the petitioner-appellant the Court of Appeals for the Ninth Circuit *impliedly* rejected the petitioner's contention that he had been deprived of due process of law by the government's failure to provide pre-trial discovery of

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[5]See, e.g. *Byrd v. Wainwright* (5th Cir. 1970) 428 F.2d 1017; *United States v. Echeles* (7th Cir. 1965) 352 F.2d 892; *United States v. Shuford* (4th Cir. 1971) 454 F.2d 772; *United States v. Donaway* (9th Cir. 1971) 447 F.2d 940.

exculpatory evidence.[6] The opinion of the Court of Appeals not only ignored the petitioner's contention that he had been denied due process of law, but, by affirming the conviction, placed the stamp of approval upon the government's dilatory response to the defendant's detailed pre-trial discovery request. Thus the government's intentional or negligent failure to provide the defendant with prompt discovery of evidence which could have established his innocence became a fault without a remedy.

A person accused of a crime has an absolute right, based upon due process of law, to obtain access to all evidence in the possession of the prosecution which could establish or tend to establish his innocence. *Brady v. Maryland* (1963) 373 U.S. 83. The United States Government, and its prosecution, have a high duty to insure that justice is done in a criminal trial and that a citizen accused of a crime has every possible opportunity to prove his innocence.

But the *Brady* decision left a basic question unanswered: At what point in time is the prosecution required to disclose exculpatory evidence to the defense? And, when does late disclosure of exculpatory evidence become a denial of due process of law?

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[6]Curiously enough the opinion of the Court of Appeals completely overlooked the petitioner's argument that the prosecution's delay in providing discovery of exculpatory evidence denied him due process. (App.A.) The petitioner-appellant again raised this crucial issue in a petition for rehearing before the Court of Appeals and again obtained *no* ruling on his argument. (App.C.)

There is an inevitable dichtomy between the broad constitutional mandate of due process articulated in the *Brady* decision and the specific rules for the disclosure of witness statements set forth in the Jencks Act. (18 U.S.C. 3500.) If the prosecution is in the possession of exculpatory evidence which is in the form of statements from witnesses other than the defendant, the prosecution can claim that the general duty of disclosure is regulated by the specific terms of the Jencks Act and that disclosure of witness statements need not occur until after the witness has testified.[7]

This case squarely raises a constitutional question of fundamental importance. How can an accused properly prepare and present an integrated and coherent defense if the government can withhold vital exculpatory evidence until midway through trial? We submit that the answer to this question is that a defendant cannot adequately prepare a defense under such circumstances and the failure of the government to provide full disclosure of *all* exculpatory evidence prior to trial deprives a defendant of due process of law. *Clay v. Black* (6th Cir. 1973) 479 F.2d 319; *United States v. Cobb* (SDNY 1967) 271 F.Supp. 159; *United States v. Hickok* (9th Cir. 1973) 481 F.2d 377.

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[7]See, generally, 18 U.S.C. 3500(a) providing, in pertinent part, that no statement of a witness need be disclosed to the defense "until such witness has testified on direct examination in the case . . ."

As to whether or not specific evidence is of an exculpatory nature, requiring pre-trial disclosure, a simple remedy would be for the government to disclose the questioned evidence to the trial judge *in camera* to obtain an objective ruling of the question.[8] If this minimal precaution had been exercised in this case it is certain that the trial judge would have ordered the immediate disclosure of the Cassidy statement to the defense. (RT Vol. 16, p. 2960.)

The determination of whether or not specific evidence is of an exculpatory nature is too subjective to leave solely in the hands of a prosecutor who is seeking to prove guilt. Prosecutors, like defense counsel, perceive evidence from an adversarial point of view. The only fair remedy for the type of problem engendered by this case is to either require the prosecution to disclose *all* evidence to the defense prior to trial, or else to have a neutral judge or commissioner review the evidence to determine which evidence is exculpatory prior to trial.

This case was a particularly close one and the petitioner vigorously contended, and still contends, that he was innocent of any wrongdoing. Had the petitioner been able to make full use of the exculpatory Cassidy statement, the outcome of this trial might have been far different.[9]

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[8]An *in camera* inspection of evidence was suggested in *Williams v. Dutton* (1968) 400 F.2d 797, 89 S.Ct. 908, 393 U.S. 1105.

[9]The petitioner was originally charged with 28 counts of criminal activity. The jury acquitted him of 23 counts. (App.B.)

2. The Court of Appeals recognized that joint trials, while desirable from the viewpoint of judicial economy, do pose certain hardships for individual defendants. (App.A, p. xvii.) But in this case the Court of Appeals upheld the denial of the petitioner's motions to sever on the premise that he had failed to show a "reasonable probability" that Cassidy would testify if severed. (App.A, p. xvi.)

In reaching its decision on the severance questions, the Court of Appeals for the Ninth Circuit followed the three-prong test for severance set forth in *Byrd v. Wainwright* (5th Cir. 1970) 428 F.2d 1017, to wit:

> 1) Whether the defendant actually intended to call his co-defendant as a witness?
>
> 2) Whether the expected testimony of the co-defendant would be exculpatory?
>
> 3) Whether the co-defendant would be likely to testify if served?

The Court of Appeals held that the petitioner met the burden of the first two tests, but failed on the third. (App.A, p. xvi.) It is submitted that the opinion of the Court of Appeals for the Ninth Circuit erred in its decision on this critical point.

The opinion of the Court of Appeals recognized that co-defendant Enis made a sufficient showing of the "willingess on the part of Cassidy to testify on behalf of Enis . . ." (App.A, p. xvi.) If Cassidy chose to testify for Enis he would, in fact, waive his Fifth Amendment right to remain silent. Since there is no recognition at law of a partial Fifth Amendment

waiver, Cassidy would be open to examination by petitioner's counsel once he testified for co-defendant Enis. And since petitioner already knew that Cassidy had given exculpatory evidence to the FBI, he clearly could have obtained this testimony from Cassidy if a severance were granted. There is simply no way by which Cassidy could have given testimony for co-defendant Enis without having also given testimony for the petitioner. Thus, as a matter of logic, since the Enis affidavit was sufficient to establish the reasonable likelihood of Cassidy testifying for Enis in a severed trial it was also sufficient to establish the likelihood that Cassidy would testify for the petitioner in such a severed trial. No other result would have been possible *had* the motions for severance been granted.

In short, the petitioner showed far more than a remote likelihood of obtaining favorable testimony from his co-defendant had a severance been granted. The unique feature of this case was the fact that the co-defendant Cassidy was formerly a government informer and had obtained his evidence at the behest of the government. Testimony for the petitioner coming from such a source might well have provided the necessary corroboration to support the petitioner's contention that he was a victim, rather than a co-conspirator. Even without the Cassidy statement the petitioner came extremely close to obtaining a complete acquittal. Had the statement been in evidence before the jury, the petitioner might well have been acquitted on all counts. For this reason the petitioner was severly harmed by the denial of his motions to sever.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the writ of certiorari should be granted.

GEORGE T. DAVIS,
JOSEPH C. MOREHEAD,
Attorneys for Petitioner.

September 29, 1977.

(Appendices Follow)

Appendix A

United States Court of Appeals
Ninth Circuit

Nos. 76-1319, 76-1318, 75-3418, 75-3423,
75-3428 and 75-3337

United States of America,
Appellee,

vs.

David Kaplan,
Appellant.

United States of America,
Appellee,

vs.

David Gorwitz,
Appellant.

United States of America,
Appellee,

vs.

Richard Dolwig,
Appellant.

United States of America,
Appellee,

vs.

Earl Vogt,
Appellant.

United States of America,
Appellee,
vs.
Walter Stradley,
Appellant.

United States of America,
Appellee,
vs.
Douglas Cassidy,
Appellant.

[May 28, 1977]

Appeals from the United States District Court
for the Northern District of California.

Before GOODWIN and SNEED, Circuit Judges, and FITZGERALD, District Judge.

PER CURIAM:*

Seven defendants were indicted upon multiple charges of mail fraud and wire fraud, together with conspiracy, in connection with a fraudulent scheme to obtain advance fees for promised loans (letters of credit) which were never delivered. The six appellants whose combined appeals are now before us present a wide variety of challenges to their convictions.

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*Because of the number and complexity of the issues, all members of the panel participated in the writing of this opinion.

I. FACTS

During the last part of 1974, a high demand for venture capital to develop real estate stimulated efforts to find money outside of traditional banking channels. All the methods, both legitimate and illegitimate, traded upon the willingness of developers to pay a premium for venture capital. David Kaplan and David Gorwitz, two of the appellants, were early organizers of a corporate entity known as Eurovest, chartered in the Cayman Islands, British West Indies. Eurovest, through one or more of the defendants, located individuals who were seeking to borrow large sums of money, and promised to arrange letters of credit. The victims were told that the letters of credit could be pledged to obtain capital for their projects.

In return for the promised financing, Eurovest would request ownership of some percentage of the venture. Most important, Eurovest required the victims to pay an "advance fee" to cover the alleged expenses of securing the letters of credit. More than $150,000 in advance fees were paid to Eurovest, but no letters of credit were ever issued nor were the advance fees returned.

Viewed in a light most favorable to the government, the evidence produced at trial showed that each of the appellants played a role in the scheme.

Appellant Vogt was a management consultant from New York. He testified that the major service he offers his clients is aid in locating financing for

business ventures. Vogt was the initial contact between Eurovest and eight of the thirteen businessmen who negotiated with Eurovest. Each of the eight men Vogt contacted subsequently dealt with appellant Stradley, who was the acting attorney for Eurovest.

Vogt represented to the victims that Eurovest was backed by a prestigious and wealthy Florida family (the Duvals), and that Eurovest had millions of dollars in securities which could be pledged to secure letters of credit.

Appellant Dolwig was prominent in state politics. He was made the trustee of the "escrow" account into which the advance fees were paid. As a California state senator, his connection with Eurovest was supposed to lend credibility and prestige to the enterprise. On occasion, Senator Dolwig reassured victims as to the substantiality of the principals behind Eurovest. His main function in the scheme was to receive advance fees, hold them in his trust account, and turn them over to Eurovest upon written instructions from the corporation.

Appellant Cassidy, an insurance agent, sent insurance binders to some of the victims. These binders purported to protect any advance fees paid by the victims in the event that the promised letters of credit were not forthcoming. From time to time, Cassidy was called upon to vouch for the reliability of the Eurovest enterprise.

The mastermind of the scheme apparently was David Kaplan. It was Kaplan who approved the

"loans" to various victims, engaged Senator Dolwig to become the west coast "escrow", convinced the Duval family to lend its name to Eurovest by furnishing the sole director and trustee of the corporation. Kaplan also personally negotiated with most of the victims.

Appellant Gorwitz worked with Kaplan. Gorwitz was the international money courier. Most of the fees from the victims were paid into Dolwig's account and then were turned over to Gorwitz. It was Gorwitz who was to deliver the letters of credit to the victims.

Much of the government's proof centered around the experience of one Paul Heck. Heck paid $60,000 in advance fees to Eurovest. When Eurovest failed to deliver its promised letter of credit, Heck began to pursue the Eurovest principals around the country. He made representations to Kaplan, Dolwig, Vogt, and Stradley that the entire Eurovest operation was fraudulent. Heck also warned Arthur Lachman, a broker who was dealing with Eurovest on behalf of a client named Conrad Preiss. Lachman, in turn, warned Vogt and Stradley. This evidence became important when some of the defendants insisted that their representations to the victims of Eurovest had been made in good faith.

II. SUFFICIENCY OF THE EVIDENCE

A. *Conspiracy Counts*

All the appellants challenge the trial court's denial of the motions for acquittal under Fed.R.Crim.P. 29

and for a new trial, on the grounds that the evidence was insufficient to convict them.

As a practical matter, the trial court in deciding a motion for acquittal in a criminal case and the court reviewing that decision on appeal use the same test. *United States v. Leal,* 509 F.2d 122 (9th Cir. 1975); *United States v. Nelson,* 419 F.2d 1237, 1241 (9th Cir. 1969). That is, viewing the evidence in a light most favorable to the government as prevailing party, is the court satisfied that the jurors reasonably could decide that they would not hesitate to act in their own serious affairs upon factual assumptions as probable as the conclusions that the defendant is guilty as charged? *United States v. Nelson, supra.*

With that test in mind, we turn to appellants' arguments:

1. *Dolwig.*

The government's proof at trial showed that, among other things, Dolwig performed the following acts in relation to the Eurovest scheme: As trustee of the account into which the advance fees were deposited, he participated in setting up a fictitious "escrow". There was no escrow, and Dolwig knew it. The account was simply a conduit to move money from the victims to Gorwitz. Dolwig reassured Paul Heck as to the substantiality of the Eurovest principals; he failed to inform other Eurovest "clients" after he knew of problems Paul Heck was having in securing his letter of credit; he appeared with appellant Kaplan in a hotel different from the one in which

Kaplan had told Heck he would be, and Dolwig's wife aided Kaplan in eluding Heck.

Dolwig does not question the factual accuracy of the government's proof, but contends that it fails to establish the requisite intent on his part to join or participate in the conspiracy. Dolwig claims that he himself was a victim who was duped into lending his good name to the Eurovest enterprise. This was a question for the jury. Although the evidence against Dolwig is entirely circumstantial, it does not have to exclude every hypothesis but that of guilt. *United States v. Nelson, supra.* Once the existence of a conspiracy is shown, only slight evidence is needed to connect a defendant with it. *United States v. Marotta,* 518 F.2d 681, 684 (9th Cir. 1975); *Fox v. United States,* 381 F.2d 125, 129 (9th Cir. 1967).

The jury could infer from the evidence that Dolwig knowingly participated in the conspiracy. It was proved that he did nothing to stop the fraud or warn others after Heck had told him that the scheme probably was a total fraud. "* * * [A] conspirator's intent to defraud may be inferred from the fact that he personally knew that the venture was operating deceitfully * * *." *Phillips v. United States,* 356 F.2d 297, 303 (9th Cir. 1965), *cert. denied,* 384 U.S. 952, 86 S.Ct. 1573, 16 L.Ed.2d 548 (1966). As we hold that the jury's decision had support in the evidence, we must affirm Dolwig's conviction of conspiracy in this case.

2. *Vogt and Stradley.*

Both Vogt and Stradley admit that they engaged in various business transactions on behalf of Eurovest. However, they claim that they were duped into believing that Eurovest was a legitimate operation. Vogt testified that, but for a lack of funds, he would have invested his own money in Eurovest letters of credit.

The government contends that Vogt and Stradley intended to defraud, and that such intent was shown by their conduct after receiving warnings from both Heck and Lachman that the scheme was a fraud. That is, Vogt and Stradley continued to negotiate deals with other Eurovest victims without any mention of Heck's and Lachman's warnings and accusations.

Credibility was for the jury. The jury had to resolve evidentiary conflicts and draw reasonable inferences therefrom. *United States v. Nelson, supra; United States v. Barham,* 466 F.2d 1138, 1140 (9th Cir. 1972), *cert denied,* 410 U.S. 926, 93 S.Ct. 1356, 35 L.Ed.2d 587 (1973). An inference of criminal intent can be drawn from circumstantial evidence. *United States v. Childs,* 457 F.2d 173 (9th Cir. 1972); *United States v. Oswald,* 441 F.2d 44 (9th Cir. 1971).

We agree with the trial judge that the jury could reasonably have inferred from the evidence that Vogt and Stradley possessed the intent to participate in the conspiracy.

3. *Kaplan and Gorwitz.*

By reference to the briefs of the other appellants, Gorwitz and Kaplan challenge the sufficiency of the evidence which led to their conspiracy conviction. It cannot, however, be seriously contended that the evidence as to these two appellants is insufficient.

There was ample testimony, which the jury reasonably could believe, showing that Kaplan was deeply involved in most of the fraudulent Eurovest transactions. Gorwitz and Kaplan continually engaged in reassuring victims as to the legitimacy of their operation.

Gorwitz was named as courier of the nonexistent letters of credit. Additionally, he took possession of at least part of the advance funds which had been deposited in the Dolwig "escrow" account. These funds eventually found their way into a joint bank account in the Bahamas which belonged to Kaplan and Gorwitz.

At trial, Kaplan, testifying in his own behalf, attempted to place the culpability for this enterprise upon unindicted co-conspirator Duval. The government provided testimony to the contrary which the jury was entitled to believe. The evidence connecting Kaplan and Gorwitz with the conspiracy is more than sufficient.

4. *Cassidy.*

By reference to the briefs of the other appellants, Cassidy challenges the sufficiency of the evidence which convicted him of the conspiracy in this case.

At trial, the government produced evidence which showed that Cassidy was actively involved in the Eurovest operation. He made false representations concerning the enterprise and he sold insurance "binders" which purported to protect any fees advanced by the victims. These "binders" were an integral part of the scheme. Victims would not proffer advance fees without some form of protection. In fact, however, Cassidy's "binders" did not protect the fees, and Cassidy knew that his "binders" were worthless.

Cassidy does not contest most of these facts. Instead he argues that he did not have any intent to join and participate in the conspiracy. On the contrary, he says, he was acting solely in the role of an F.B.I. informer throughout his association with Eurovest.

The government produced witnesses who testified that Cassidy went beyond his informant role in making false representations to Eurovest victims. Also, the testimony showed that Cassidy did not inform the F.B.I. that he had made such representations.

The jury was entitled to believe that Cassidy actively participated in the Eurovest scheme and that he had the necessary intent to defraud. The jury was not required to believe that Cassidy was acting solely as a government informant, and it did not. Therefore, we affirm Cassidy's conviction on the conspiracy count.

B. *Substantive Counts*

With one exception, the evidence was sufficient to support the convictions of the appellants on all substantive counts charged. At least one of the appellants performed one or more of the illegal acts charged, and the acts charged were in furtherance of the conspiracy. All the appellants became guilty of the substantive acts by virtue of their participation in the conspiracy. *Pinkerton v. United States,* 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946).

The one exception is Count 22, which charges the appellants with mail fraud in connection with a letter sent from Arthur Lachman to Cassidy. We find that the evidence is insufficient to support a conviction on this count. The court should have granted the Rule 29 motion for acquittal on Count 22.

Lachman was a "money broker" who was negotiating with Eurovest on behalf of his clients. Lachman was concerned with obtaining insurance to protect any advance fees which were paid into the Dolwig account. In his negotiations with Eurovest, Lachman had occasion to speak with Cassidy in a conference call which included Kaplan. Cassidy made representations to Lachman concerning the extent of coverage that Cassidy's insurance company would provide.

Some time after this phone call, Lachman mailed the Count 22 letter to Cassidy. In it he asked for a confirmation of the oral representations Cassidy had made on the telephone. Cassidy sent no such confirmation.

The letter from Lachman to Cassidy could not form the basis of the mail fraud charged in Count 22 of the indictment, 18 U.S.C. § 1341. To violate § 1341, a defendant must be involved in a scheme to defraud, and he must cause a mailing for the purpose of executing that scheme. *Pereira v. United States,* 347 U.S. 1, 74 S.Ct. 358, 98 L.Ed. 435 (1954).

The evidence supports a finding that (a) there was a scheme to defraud, (b) Cassidy was involved, and (c) a mailing occurred. Furthermore, the evidence supports the conclusion that Cassidy caused the mails to be used in that it was reasonably foreseeable that Cassidy's oral representations to Lachman would result in the use of the mails to obtain a written confirmation. *See United States v. Maze,* 414 U.S. 395, 399, 94 S.Ct. 645, 38 L.Ed.2d 603 (1974); *Pereira v. United States,* 347 U.S. at 8-9, 74 S.Ct. 358.

However, to affirm this conviction we must also find that this mailing was in furtherance of the scheme to defraud. Use of the mails that is not a step toward receipt of the fruits of the scheme is not a violation of § 1341. *United States v. Maze, supra; Kann v. United States,* 323 U.S. 88, 65 S.Ct. 148, 89 L.Ed. 88 (1944); *United States v. Staszcuk,* 502 F.2d 875 (7th Cir. 1974), *modified en banc on other grounds,* 517 F.2d 53, *cert. denied,* 423 U.S. 837, 96 S.Ct. 65, 46 L.Ed.2d 56 (1975); *Henderson v. United States,* 425 F.2d 134 (5th Cir. 1970).

Although the oral representations made by Cassidy were in furtherance of the Eurovest scheme, the letter from Lachman in response to those representations

was not. Therefore, the convictions of those appellants who were convicted on Count 22 of the indictment are reversed.

III. SEVERANCE FROM TRIAL OF CASSIDY

Appellants Kaplan, Gorwitz, Vogt, Stradley, and Dolwig insist that each should have had his trial severed from that of Cassidy. Each insists that his joinder with Cassidy prejudiced him sufficiently to require severance pursuant to Fed.R.Crim.P. 14.

To evaluate these contentions it is helpful to set forth certain principles. Motions to sever must be timely made and properly maintained, or the right to severance will be deemed waived. *United States v. Figueroa-Paz,* 468 F.2d 1055 (9th Cir. 1972). To preserve the point, the motion to sever must be renewed at the close of all evidence. 468 F.2d at 1057. This requirement is not an inflexible one; waiver may be absent when the motion accompanies the introduction of evidence deemed prejudicial and a renewal at the close of all evidence would constitute an unnecessary formality. Diligent pursuit of a severance motion is the guiding principle. *United States v. Burnley,* 452 F.2d 1133 (9th Cir. 1971); *Williamson v. United States,* 310 F.2d 192 (9th Cir. 1962). Premature motions to sever not diligently pursued as the prejudicial evidence unfolds cannot serve as insurance against an adverse verdict.

On another occasion we have observed:

> "The power vested in the district court pursuant to Rule 14 is discretionary, and the only

> question on appeal is whether such discretion has been abused. *Parker v. United States,* 404 F.2d 1193 (9th Cir. 1968), cert. denied, 394 U.S. 1004, 89 S.Ct. 1602, 22 L.Ed.2d 782 (1969). The test is whether a joint trial is so prejudicial to one defendant as to require the exercise of that discretion in only one way, that is, by ordering a separate trial." *United States v. Thomas,* 453 F.2d 141, 144 (9th Cir.), *cert. denied,* 405 U.S. 1069, 92 S.Ct. 1516, 31 L.Ed.2d 801 (1971).

See United States v. Echeles, 352 F.2d 892, 896 (7th Cir. 1965).

In determining whether the trial court abused its discretion, ordinarily we must view its denial of a motion to sever as of the time of denial. Only in rare cases will a trial court's failure to reopen, *sua sponte,* the question of severance constitute an abuse of discretion. *Byrd v. Wainwright,* 428 F.2d 1017, 1019 n.1 (5th Cir. 1970).

The trial court, in considering a motion to sever based upon a defendant's insistence that a codefendant will provide exculpatory testimony after severance, must weigh, *inter alia,* the good faith of the defendant's intent to have a codefendant testify, the possible weight and credibility of the predicted testimony, the probability that such testimony will materialize, the economy of a joint trial, and the possibility that the trial strategy of a codefendant (a decision to plead guilty, for example) will prejudice the defendant seeking severance. *Byrd v. Wainwright,* 428 F.2d at 1019-20. Our review of the trial court's

exercise of its discretion must recognize the complexity and difficulty of this process of weighing.

Applying these principles to the denial by the trial court of the motions to sever by appellants Kaplan and Gorwitz presents little difficulty. In neither instance was the motion diligently pursued; hence any right to severance was waived. Both moved for a severance before trial, but such motions were not renewed when Cassidy indicated he would not testify and the existence of the FBI form 302 containing the allegedly exculpatory statements became known.

The circumstances are different with respect to Vogt, Stradley, and Dolwig. Each pursued diligently the motion to sever, renewing it during trial at the time Cassidy refused to testify, and when the existence of the FBI form became known. Although none of the three renewed the motion at the close of all evidence, the trial court had previously indicated that a renewal would be useless. Under these circumstances neither Vogt, Stradley, nor Dolwig waived his right to seek a severance.

Turning to appellants Vogt and Stradley initially, it is clear that each intended in good faith to attempt to induce Cassidy to testify. Also, by means of summaries by their counsel of the tenor of Cassidy's testimony which they expected, they sufficiently demonstrated the exculpatory character of Cassidy's expected testimony. Although an affidavit by Cassidy would have strengthened the credibility of this proposed testimony, we are not prepared to require such

an affidavit under the circumstances of this case. *Cf. United States v. Shuford,* 454 F.2d 772 (4th Cir. 1971).

However, these summaries did not indicate a reasonable probability that Cassidy would give his exculpatory testimony. *Cf. United States v. Shuford, supra.* By contrast, the affidavits accompanying the motion to sever by defendants Enis did indicate a willingness on the part of Cassidy to testify on behalf of Enis. No such indication appears in the statements supporting the severance motions of Vogt and Stradley. At best these summaries only demonstrated a "remote likelihood" that Cassidy's exculpatory testimony would become available. That is not enough. *See United States v. Thomas, supra.*

It is also true that Vogt obtained the benefit of Cassidy's opinion that Vogt was a "victim" of wrongdoing rather than a wrongdoer, through the cross-examination of Agents McKee and Bumpers. While the agents' testimony is not an adequate substitute for Cassidy's, it does strengthen our resolve not to characterize the trial court's refusal to sever as an abuse of discretion.

What has been said concerning appellants Vogt and Stradley is equally applicable to appellant Dolwig. The summary of the anticipated Cassidy testimony prepared by Dolwig's counsel reflected no reasonable probability that Cassidy would testify had Dolwig's trial been severed. Indeed, it would be unusual to expect such testimony. Moreover, the contents of this summary were read into evidence,

thereby somewhat lessening any prejudicial effect of Cassidy's refusal to testify in the trial.

Dolwig also argues, relying on *United States v. Donaway,* 447 F.2d 940, 943 (9th Cir. 1971), that failure to sever him was an abuse of discretion because certain evidence put before the jury, while admissible with respect to other defendants, was not admissible against Dolwig. We believe the facts in *Donaway* far more clearly indicate an abuse of discretion than those present in this case. The fundamental issue is whether the jury can be expected to keep separate the evidence as it pertains to each jointly tried defendant. *Fernandez v. United States,* 329 F.2d 899, 906 (9th Cir. 1964). As Fernandez observes, the best indication of the jury's ability to compartmentalize is its failure to convict all defendants. 329 F.2d at 906. The failure to convict Enis provides such an indication here. Moreover, our view of the record convinces us that the jury was able to keep separate the evidence as it pertained to Dolwig.

Finally, Dolwig contends that he was unduly prejudiced by references during the trial to the Mafia and by Cassidy's entrapment defense. Both invoke the *Fernandez* inquiry, and both must be disposed of in the same manner as was Dolwig's complaint regarding evidence inadmissible as to him. We believe the jury could, and did, compartmentalize the evidence properly.

Obviously our refusal to hold that the trial court abused its discretion in refusing to sever Vogt, Stradley, and Dolwig from the trial of Cassidy is

influenced by the truism that joint trials are usually less burdensome to the prosecution than separate trials. This economy does not entitle us to treat lightly, however, appeals based on refusals to order separate trials. Joint trials do alter the emotional and factual setting within which an individual's guilt or innocence is to be determined. Our task on review is to review carefully the record to determine whether the trial court abused its discretion in ordering a joint trial. We have made that review and hold that no such abuse exists in this case. *United States v. Wood,* 550 F.2d 435 (9th Cir. 1976).

IV. THE INSTRUCTIONS

1. *Dolwig*

Dolwig contends that the trial court committed reversible error when it gave the government's proposed instructions relating to mail fraud (18 U.S.C. § 1341), transportation fraud (18 U.S.C. § 2314), and conspiracy to commit such offenses (18 U.S.C. § 371), on the ground that there was no evidence presented to support those charges. But we have indeed found evidence sufficient to support Dolwig's conviction on all substantive counts, with the exception of Count 22 charging mail fraud.[1] Furthermore, we have rejected his argument that the government failed to establish the requisite intent to support the conspiracy convic-

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[1]Dolwig was convicted on two counts (Counts 21, 22) of violating 18 U.S.C. § 1341. In part II(B) of this court's opinion, his conviction on Count 22 is reversed. Dolwig was also convicted of four counts of transportation fraud and one count of conspiracy.

tion. Thus, the instructions, except parts relating to Count 22, are clearly supported by the evidence.

Dolwig also asserts error in the refusal to give three requested instructions pertaining to his theory of defense. He relies on *Baker v. United States,* 310 F.2d 924, 930 (9th Cir. 1962), *cert. denied,* 372 U.S. 954, 83 S.Ct. 952, 9 L.Ed.2d 978 (1963). The three requested instructions[2] relate to Dolwig's purported role as an "escrow holder", innocent of all wrongdoing and himself a victim of the Eurovest scheme.

While it is clear that the trial judge must instruct the jury as to the defendant's theory of the case, the instructions given need not be in the precise language requested by the defendant. *Charron v. United States,* 412 F.2d 657, 660 (9th Cir. 1969); *Rivers v. United*

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[2]Defendant Dolwig's Proposed Jury Instruction No. 1:

"In each instance in which the Defendant, RICHARD DOLWIG is charged, he purported to act as an escrow agent. If you find from all of the evidence that he believed that this was his role, that he did not mislead any third persons with reference to his role and that he had no knowledge that the role which he accepted was part of any scheme of any others to commit any offense charged, or if you have a reasonable doubt as to the above, then you must find Defendant, RICHARD DOLWIG not guilty as to all counts."

Defendant Dolwig's Proposed Jury Instruction No. 2.

"The mere fact standing alone that a particular defendant may have held a sum of money for a period of time is not sufficient upon which you may base a verdict of guilty. In order to return a guilty verdict, based on such a fact, you must also find beyond a reasonable doubt that such person had an intent to defraud."

Defendant Dolwig's Proposed Jury Instruction No. 3.

"If you find that Defendant, RICHARD DOLWIG, believed that persons dealing in matters in which he was to be escrow agent would either receive letters of credit or have their money refunded, or if you entertain a reasonable doubt of such belief on his part, then you must find him innocent as to all counts in which he is charged."

States, 368 F.2d 362, 364 (9th Cir. 1966). The refusal to give a requested instruction is not error "if the charge as a whole adequately covers the theory of the defense." *United States v. Blane,* 375 F.2d 249, 252 (6th Cir. 1967), *cert. denied,* 389 U.S. 835, 88 S.Ct. 41, 19 L.Ed.2d 96 (1967), *reh'g denied,* 389 U.S. 998, 88 S.Ct. 459, 19 L.Ed.2d 503 (1967). Thus, the adequacy of the jury instructions is "not be determined by the giving, or failure to give, any one or more instructions," but by examining the instructions as a whole. *Beck v. United States,* 305 F.2d 595, 599 (10th Cir. 1962); *United States v. Alvarez,* 469 F.2d 1065, 1067 (9th Cir. 1972); *United States v. Moore,* 522 F.2d 1068, 1079 (9th Cir. 1975), *cert. denied,* 423 U.S. 1049, 96 S.Ct. 775, 46 L.Ed.2d 637.

Viewed in their entirety, the instructions thoroughly elaborated on the terms "knowingly," "willfully," "specific intent," and "intent to defraud." While Dolwig's requested instructions were refused, the given instructions provided the jury with adequate guidance to consider evidence relating to the defense that he was an escrow holder, innocent of any wrongdoing.

Finally, Dolwig challenges Instruction 32, regarding knowing participation in a scheme to defraud, as being unfairly tailored to the facts of the case, and the refusal of the trial court to give an instruction on the requirement of actual knowledge as an essential element of each offense. The instructions, when viewed as a whole, adequately charged the jury on knowledge. Instruction 32 properly addressed the law applicable

to the prosecution counts. Therefore, Dolwig's latter contentions must be rejected.

2. *Cassidy*

Appellant Cassidy contends that his conviction[3] must be reversed because of the trial court's refusal to give two requested jury instructions. Requested Instruction No. 3[4] relates to his claim that he lacked the requisite criminal intent because he was acting as a government informant. Requested Instruction No. 2[5] deals with the related claim that he acted in conformity with the agreement of nonprosecution he entered into with the Government. Cassidy further argues that the standard entrapment instruction[6] given by the trial court did not adequately present his defense of lack of *mens rea.*

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[3]Cassidy was convicted on one count (Count 16) of wire fraud, two counts (Counts 21, 22) of mail fraud, one count (Count 27) of racketeering, and one count (Count 28) of conspiracy. Count 22 was reversed as to all defendants.

[4]"If you find the evidence in this case shows that defendant CASSIDY honestly and reasonably thought the actions and representations he was making to others were in the course of his activities as an informant or government agent you should acquit him on all counts."

[5]"If you find the evidence in this case is that: 1) Defendant CASSIDY entered into an agreement with the government through its agents to cooperate with it by providing information in exchange for a promise of non-prosecution and 2) that defendant CASSIDY has substantially complied with his part of the agreement, then you must acquit DOUGLAS CASSIDY on all counts.

"Substantially complied with means that Defendant CASSIDY has provided the basic information and performed in a manner asked and that there is no omission of the essential requirements expected of him and that the information that was provided was satisfactory for the case under investigation."

[6]1 Devitt and Blackmar, Federal Jury Practice and Instructions § 13.13 (2d ed. 1970).

Cassidy's contentions concerning the insufficiency of the instructions, like Dolwig's, must be rejected. During trial, Cassidy attempted to show that he "honestly and reasonably thought the actions and representations he was making to others were in the course of his activities as an informant." Through the testimony of FBI agents Bumpers and McKee, he tried to adduce evidence of entrapment from government encouragement of his activities and his own adherence to, and reliance upon, the agreement of nonprosecution with government prosecutors in Los Angeles. The entrapment instruction given by the court, when read *in pari materia* with the instructions on specific intent, willfulness, and knowledge, adequately presented the defense of lack of criminal intent. *See United States v. Elksnis,* 528 F.2d 236, 238 (9th Cir. 1975). The trial judge did not commit error in refusing to give the particular instructions Cassidy sought. *See Rivers v. United States, supra.*

Cassidy additionally challenges the complete "package" of instructions as being insufficiently tailored to the unique facts underlying his informant defense to enable the jury to assess his culpability separately from that of his codefendants. Although one identical specific-intent instruction was given as to all defendants, the trial court did instruct the jury that "each defendant is entitled to have his case determined from evidence as to his own acts and statements and conduct, * * * leaving out of consideration entirely any evidence admitted solely against some other defendant or defendants." Cassidy was not prejudiced by the

absence of a separate specific-intent instruction applicable to him alone.

7. PROSECUTORIAL MISCONDUCT

Cassidy contends that he should have been granted a mistrial because the government brought up, during the questioning of a federal agent, the point that Cassidy had first come to the attention of the FBI when that agency was asked to watch Cassidy board a plane for England so his attire could be described to Scotland Yard. This more or less harmless remark was shortly supplemented by the hearsay intelligence that Cassidy was of interest because of his possible role in the international transportation of stolen securities. While the prosecutor's inept control of the questioning at that point raises some questions about prosecutorial good faith there was no basis for mistrial. At issue was whether Cassidy was an abused, faithful, confidential informer or a faithless double agent. Resolution of that issue requires that the story's beginning be told. This is what the prosecutor drew from the agent and what Cassidy's counsel previously had carefully avoided. Defense counsel correctly extracted only those portions of the story that tended to support his theory of the case. The prosecutor followed the same course from the point of view of the government. We detect no error.

VI. CASSIDY'S CHALLENGE TO THE INDICTMENT

Appellant Cassidy argues for the first time on appeal that the prosecutor's failure to present exculpatory evidence of his status as a government informer to the grand jury requires a dismissal of the indictment against him.[7] A showing of fundamental error is necsssary before we will consider issues not raised below. *United States v. Murray,* 492 F.2d 178 (9th Cir. 1973), *cert. denied sub nom., Roberts v. United States,* 419 U.S. 854, 95 S.Ct. 98, 42 L.Ed.2d 87 (1974). *See* Fed.R.Crim.P. 52(b).

No such error has been shown to exist. Appellant has not demonstrated that he was prejudiced by the challenged prosecutorial conduct. He has failed to show that his role as an informer actually exculpates him. As a consequence, his reliance on cases involving the use of perjured testimony relevant to a material element in an indictment is misplaced. *See United States v. Basurto,* 497 F.2d 781 (9th Cir. 1974). We can no more assume exculpation than we can materiality. Moreover, we recognize the wide discretion which the prosecution may exercise in grand jury

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[7]Motions to dismiss an indictment must be made before trial or they are waived. Fed.R.Crim.P. 12(b)(2), (f); *see, e. g., Mitchell v. United States,* 434 F.2d 230 (9th Cir. 1970), *cert. denied,* 402 U.S. 946, 91 S.Ct. 1636, 29 L.Ed.2d 115 (1971). The trial court may, however, defer determination of the motion, Fed.R.Crim.P. 12(e), or grant relief from the waiver for good cause. Fed.R.Crim.P. 12(f). Cassidy failed to include this ground in his pretrial motion to dismiss the indictment; this failure alone is excusable because he did not receive a transcript of the relevant grand jury proceedings until midway through the trial. Nevertheless, he has no similar excuse for his failure to renew his motion during trial.

proceedings. *United States v. Y. Hata & Co.*, 535 F.2d 508 (9th Cir. 1976).

Except for the convictions upon Count 22, which are in each instance reversed, all other convictions are affirmed.

Affirmed in part; reversed in part.

Appendix B

United States District Court
for the Northern District of California

Docket No. Cr 75-504-SC

United States of America
vs.
Earl Vogt
Defendant

[Filed October 16, 1975]

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this

Month	Day	Year
October	10	1975

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

COUNSEL

..... WITHOUT COUNSEL

X WITH COUNSEL GEORGE T. DAVIS, Esq.
(Name of Counsel)

PLEA

..... GUILTY, and the court being satisfied that there is a factual basis for the plea,

..... NOLO CONTENDERE,

X NOT GUILTY

FINDING & JUDGMENT

There being a verdict of

..... NOT GUILTY. Defendant is discharged

X GUILTY.

Defendant has been convicted as charged of the offense(s) of conspiracy, in violation of: 18 USC 371; mail fraud, in violation of: 18 USC 1341; fraud by wire, in violation of 18 USC 1343; and racketeer influenced and corrupt organizations, in violation of 18 USC 1962(c) and 1961(1)(B), as charged in a 28-count indictment.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

TWO (2) YEARS as to Count 12; TWO (2) YEARS as to Count 21; TWO (2) YEARS as to Count 22; FIVE (5) YEARS as to Count 27; and FOUR (4) YEARS as to Count 28. All sentences are to run concurrently with each other.

It is further Ordered any appearance bond filed herein is hereby exonerated.

SPECIAL CONDITIONS OF PROBATION

[None]

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period

of five years permitted by law, may issue a warrant and revoke probation for a violation occuring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

/s/ Samuel Conti
U.S. District Judge

Date October 15, 1975

Entered in Criminal Docket 10-16-75

Appendix C

United States Court of Appeals
for the Ninth Circuit

United States of America, Appellee, vs. David Kaplan, Appellant.	No. 76-1319
United States of America, Appellee, vs. David Gorwitz, Appellant.	No. 76-1318
United States of America, Appellee, vs. Richard Dolwig, Appellant.	No. 75-3418
United States of America, Appellee, vs. Earl Vogt, Appellant.	No. 75-3423
United States of America, Appellee, vs. Walter Stradley, Appellant.	No. 75-3428
United States of America, Appellee, vs. Douglas Cassidy, Appellant.	No. 75-3337

[Filed Sept. 6, 1977]

ORDER

Appeals from the United States District Court
for the Northern District of California

Before: GOODWIN and SNEED, Circuit Judges and FITZGERALD,* District Judge.

The court having considered the following: petition for rehearing with suggestion for rehearing en banc filed in case No. 75-3418 by appellant Dolwig June 16, 1977; petition for rehearing filed in case No. 75-3423 by appellant Vogt June 8, 1977; petition for rehearing filed in case No. 75-3428 by appellant Stradley June 9, 1977, and appellee's answer thereto filed July 26, 1977; and petition for rehearing with suggestion for rehearing en banc filed in case No. 75-3337 by appellant Cassidy June 8, 1977,

IT IS ORDERED that, in response to appellant Stradley's petition for rehearing, the opinion filed May 26, 1977, in the above cases is amended as follows:

Delete the last four lines of the text in the slip opinion, and substitute the following wording:

> Except for the convictions upon Count 22, which are in each instance reversed, and Stradley's conviction upon Count 27, all other convictions are affirmed.
>
> Stradley was sentenced on Count 21 to two years, on Count 27, to five years, and on Count 28 to four years, all sentences to run concurrently.

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*The Honorable James M. Fitzgerald, United States District Judge for the District of Alaska, sitting by designation.

Stradley's conviction upon Count 27 is set aside upon the government's agreement, on a petition for rehearing, that it depended upon Count 22 and falls with the conviction upon Count 22.

Affirmed in part; reversed in part; remanded for entry of a modified sentence in No. 75-3428, *United States v. Walter Stradley.*

The suggestions for rehearing en banc have been circulated to the full court, and the full court has been advised of the proposed amendment to the opinion and of the panel's recommendation that the petitions be otherwise denied and the suggestions for en banc be rejected. No judge of the court has requested en banc consideration.

Except for the amendment set forth above, the petitions for rehearing are denied, and the suggestions for rehearing en banc are rejected.